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Of Correct Views on Law Without The State

Thomas Schultz

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Law without the state is a vexed topic for dispute settlement theorists, and for some practitioners too. It is also an important topic, in that it helps us understand what dispute settlement is all about, at least from a 30'000 thousand foot view, and what relationships it entertains with the idea of law. Over the decades innumerable attempts have been made to tell us what the correct view on this question is. But what if there is no correct view?

Let me begin from the beginning. In many part of the world, state borders are increasingly less relevant. This is not only so for commercial transactions and arrangements, but also for the way we think of ourselves, and thus for our allegiances and for the rules we believe we should obey. It's probably rarely been the case since the 17th century that we orient our behaviour so much according to transnational rules – rules that, like clouds and pollution, like economic transactions and crises, have little regard for the imagined communities we call nations.

Yet most of us lawyers continue as if nothing happened; as if these developments were the problem of economists, sociologists, political scientists, and soon historians, but not really the problem of lawyers; as if the only thing it really is appropriate for lawyers to think about is what happens in court (national and international); as if we had to take instructions from states about what law is and, in return, help states determine what that law exactly says; as if our students could have no other calling than to engage in a trade that, ultimately, revolves around what states and their courts do; as if we had no other choice, when thinking about law, than to think about what states undertake; as if the frontiers of legal thinking had to match the political borders of states.

Not that states are unimportant politically and socially. They can do things, good and bad, no one else can. But to give them the power to constrain what intellectuals in law can think about when they think about law and teach law: that is a different story entirely. Yet it is a story we tell ourselves quite often. And when we do, we usually skip the first chapter, in which we see the hero of the story (that would be ourselves, the lawyers) granting states the monopoly of law-making. For indeed that first chapter could have been written differently. The relationship between society and law does not have to be a relationship between society and states, between society and nations. It is only the way we lawyers usually want to think about it.

Strangely enough, perhaps, a great challenge we lawyers face today in our attempts to grapple with our changing, “transnationalising” world, lies within ourselves. A great new frontier of transnational law is indeed introspective, or “reflexive” as our jargon would have it. It starts with the realisation that law is whatever we call law. There is nothing inherent in law that makes law *law*. We could call law whatever set of rules a community gives itself. It could be a qualified version of this idea, for instance only those rules that embody certain basic human right ideals. Or it could be whatever the ruling power says it is. We are all potential Humpty Dumpies. There is nothing inherent in law that makes it only creatable by states. Law is whatever we *want* to call law. This means we have a choice.

We have a choice about how we want to define what we lawyers are supposedly competent to talk about: law. And it seems to be empirically true (I don’t think this has ever been properly studied) that most people believe they should, in general, obey the law, that it is, on most occasions, morally better to follow the law than to break it. If that is indeed true, isn’t it possibly meaningful what we do call law?

The problem with this choice, for us lawyers, is that we can’t answer it based on... the law. So we have to reach out beyond the traditional frontiers of our discipline to look for answers.

And what we find there is, again, foreign to the natural habitat of the lawyer: there are a number of possible answers to the question of what it might be appropriate to call law. Some are better, some are worse. Different answers, different ways to understand what law is, empower different actors (by giving them law-making powers), and thus advance different interests. The less states have the monopoly of law-making, the more interests other than state interests are likely to be advanced. As a consequence, there are incentives for certain understandings of law to be pushed, and socio-professional constraints put in the way of others.

All of this is, as I said, fairly foreign to lawyers. It is also so because it forces us to see that there aren't simply right and wrong answers, and that several understandings of what law is can validly coexist at the same time. It calls on us to practice intellectual pluralism. Let me tell a story to explain this.

Two individuals call on a rabbi to resolve their dispute. The rabbi listens closely to the first person, and finally says "you are right". The second individual launches into a detailed repartee, defending the exact opposite view. "You are right too", the rabbi enthusiastically responds. The rabbi's wife, who had overheard the discussions, sighs, and admonishes her husband: "you can't say that they are both right!". The rabbi thinks about it for a while and answers "you, my dear wife, are right too."